Supreme Court, U.S.
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85-1839

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BERRY GALLON,

Petitioner,

v.

LEVIN METALS CORP., a California Corporation, and INDUSTRIAL, IRON AND METAL PROCESSING WORKERS UNION, LOCAL 1088,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 1986

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QUESTION PRESENTED*

Did the Court of Appeals err by holding that a lawsuit to enforce the duty of fair representation must be served within the six month statute of limitations, and not just filed in court within that time?

* All parties to the proceeding in the court below are listed in the caption.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Berry Gallon petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the district court is not reported, and is set forth at pages 5a to 7a of the appendix to this petition ("App. 5a-7a"). The court of appeals' opinion is reported at 779 F.2d 1439 and is set forth at App. 1a to 4a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 7, 1986. App. 8a. On March 26, Justice Rehnquist extended the time for filing a petition for the writ of certiorari until May 7, 1986. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

STATEMENT

Petitioner Berry Gallon was discharged in early 1983 by respondent Levin Metals Corporation after ten years of employment in a variety of jobs. He asked respondent Industrial and Metal Processing Workers Union, Local 1088, to process a grievance on his behalf, but it refused to do so. Petitioner did not learn of Local 1088's position in this regard until September 22, 1983. On March 21, 1984, petitioner filed a complaint in state court against both respondents alleging that he had been fired in violation of the collective bargaining agreement between Levin Metals and Local 1088, that his discharge was motivated by racial animus, and that the union had failed to process his grievance for similar reasons. The complaint was not served on Local 1088 until March 28, 1984, and on Levin Metals until April 13, 1984.

The case was removed to the United States District Court for the Northern District of California, which granted respondents' motion for summary judgment and dismissed the complaint as untimely. It first decided that the statute of limitations did not begin to run until September 24, 1983, two days after Gallon learned of the respondents' joint position that he would not be reinstated. Accordingly, the complaint had been filed within the six-month limitations period announced by this Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983). Nevertheless, the court decided that because section 10(b) of the National Labor Relations Act, from which this Court had borrowed the six-month limitations period, requires service as well as filing within the six-month period, service of a fair representation suit was also required within that time. App. 6a.

The United States Court of Appeals for the Ninth Circuit affirmed. It reasoned that in *DelCostello* this Court had chosen to follow the balance of considerations reflected in section 10(b) in establishing the time for initiating fair representation suits, and although the Court had not specifically mentioned service as well as filing within six months, that was an explicit requirement of section 10(b): "Because the Court in *DelCostello* seem-

ingly adopted section 10(b) *in toto*, we would be remiss were we to eliminate the service requirement." App. 3a.

REASONS FOR GRANTING THE WRIT

This case presents the same issue as two other cases in which certiorari petitions have been filed: namely, whether the requirement in section 10(b) of the National Labor Relations Act that unfair labor practice charges be served on respondents as well as filed with the General Counsel of the National Labor Relations Board within the six-month limitations period, should also apply to require service of complaints in fair representation suits within that same six months. *Continental Baking Co. v. Macon*, No. 85-1400 (petition filed on February 21, 1986); *West v. Conrail*, No. 85-1804 (petition filed on May 2, 1986). If the Court grants certiorari in either of those two cases, this case should be held until the other case is decided, and should then be decided accordingly. If certiorari is granted in this case, it should be consolidated with the other two for argument and disposition. We believe, however, that the issue can be most efficiently litigated and decided by following the first alternative.

CONCLUSION

The petition for certiorari should either be held for disposition consistent with *Continental Baking* or *West*, or should be granted and the case consolidated with the other two cases presenting the same issue.

Respectfully submitted,

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Attorneys for Petitioner

May 7, 1986

APPENDIX

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERRY GALLON,	)No. 85-1769
Plaintiff-Appellant,	)
vs.	)D.C. No. C-84-2425-EFL
	)
LEVIN METALS CORPORATION, et al.,	)
	)
Defendants-Appellees.	)
	)
ROBERT E. HANSTEN,	)No. 85-1814
Plaintiff-Appellant,	)D.C. No. C-84-7132-WHO
vs.	)
	)OPINION
UNITED AIRLINES, Inc., et al.,	)
Defendants-Appellees.	)

Appeals from the United States District Court
Northern District of California
Hon. Eugene F. Lynch, Judge Presiding
Hon. William H. Orrick, Judge Presiding
Argued and Submitted: November 12, 1985
San Francisco, California

Before: WALLACE, ANDERSON, and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge.

In *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 155 (1983), the Supreme Court held that the six-

month statute of limitations found in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies to an employee's suit against an employer and a union alleging the employer's breach of a collective bargaining agreement and the union's breach of its duty of fair representation. These two consolidated cases present the question whether the six-month service requirement of section 10(b) similarly applies to such "hybrid" suits. We hold that it does and therefore affirm the district court's grant of summary judgment in favor of the appellees, the unions and the employers.

STANDARD OF REVIEW

We review a grant of summary judgment *de novo* and will affirm if, viewing the evidence in the light most favorable to the party opposing the motion, we find no genuine issue of material fact and determine that the moving party was entitled to judgment as a matter of law. *Poland v. Martin,* 761 F.2d 546, 547 (9th Cir. 1985).

DISCUSSION

The record, viewed in the light most favorable to appellant employees, reveals that although they filed their complaints within the six-month statute of limitations period, no complaint was *served* within the six-month period. The only question before us, therefore, is whether the failure to serve appellees within the six-month period bars the employees' action.

In *DelCostello,* the Court was faced with the lack of a uniform statute of limitations for hybrid actions by an employee. Rather than adopting a state statute of limitations, the Court adopted a provision of the National Labor Relations Act ("NLRA") pertaining to the time for filing an unfair labor practice charge with the National Labor Relations Board. 462 U.S. at 169-72. Section 10(b) of the NLRA provides:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy

> thereof upon the person against whom such charge is made.

29 U.S.C. § 160(b). The Court felt that this statute provided a closer analogy than state statutes of limitations because of the similarity of "hybrid" suits to unfair labor practice charges and because of the similarity of "considerations relevant to the choice of a limitations period." 462 U.S. at 170-71. The Court stated:

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. . . . Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this.

Id. at 171 (citing *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70-71 (1981) (Stewart, J. concurring)) (citations omitted).

These considerations seem to counsel the adoption of the six-month service requirement as well. While the Court in *DelCostello* did not specifically address the timing of service in hybrid suits, we note that section 10(b) expressly requires both filing *and* service within a six-month period. *See N.L.R.B. v. Local 264, Laborers International Union*, 529 F.2d 778, 782 (8th Cir. 1976) ("The statute is clear in providing that a charge must not only be filed, it must also be served within the prescribed six month period."), *quoted in Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 614 (11th Cir. 1984) (per curiam) (holding six month service requirement applies to hybrid actions). Because the Court in *DelCostello* seemingly adopted section 10(b) *in toto*, we would be remiss were we to eliminate the service requirement.

The Eleventh Circuit found these reasons persuasive and has consistently held that in addition to the filing requirement, the six-month service limitation of section 10(b) applies in hybrid cases. *See Williams v. Greyhound Lines, Inc.*, 756 F.2d 818, 820 (11th Cir. 1985); *Dunlap v. Lockheed-Georgia Co.*, 755 F.2d 1543, 1544 (11th Cir. 1985); *Simon v. Kroger Co.*, 743 F.2d 1544, 1546 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2155 (1985); *Howard v. Lockheed-Georgia Co.*, 742 F.2d at 614. We believe that the uniformity sought by the Court in *DelCostello* would be further served by following the Eleventh Circuit's approach.

Accordingly, a hybrid action alleging breach of a collective bargaining agreement by an employer and a breach of fair representation by a union must be filed and served within six months of the action's accrual. Summary judgment granted appellees in both cases is therefore affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BERRY GALLON,	)
	)
Plaintiff,	) No. C-84-2425 EFL
	) SUMMARY JUDGMENT
vs.	)
	)
LEVIN METALS CORPORATION, a California Corporation, IRON & METAL PROCESSING WORKERS UNION, LOCAL 1088,	)
Defendants.	)
	)

This matter is before the Court on the defendants Levin Metals' and Union Local 1088's motion for summary judgment. The first basis for the defendants' motion is that the plaintiff's action is barred by the statute of limitations. In actions alleging breach of a collective bargaining agreement and the duty of fair representation, such as this one, the Supreme Court has held that the applicable statute of limitations is the six month requirement stated under section 10(b) of the National Labor Relations Act. *DelCostello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983). As required by § 10(b), the plaintiff must file and serve the action within the six month period. 29 U.S.C. § 160(b). *See also Hoffman v. United Markets, Inc.*, 117 LRRM 3229, 3230 (N.D. Cal. 1984); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612, 613 (11th Cir. 1984) (the holding of *DelCostello* mandates service of process within the limitations period as part of the express statutory provision of § 10(b)).

In order to determine whether this six month statute of limitations bars the plaintiff in this case, it is necessary to determine when the plaintiff's action accrued and when he filed and served his complaint upon the defendants.

A. *When did the plaintiff's cause of action accrue?*

The Supreme Court in *DelCostello* concluded that the plaintiff's cause of action in cases against an employer and a union did not accrue until he exhausted his contractual remedies under the collective bargaining agreement. *DelCostello*, at 2285-86, 2294. *See also Hoffman* at 3230. The collective bargaining agreement in effect at the time of Gallon's "termination" stated that "any appeal in a discharge case must be made in writing within 48 hours after the discharge, or the right of appeal is lost." Mr. Gallon did not file a grievance within this statutory period. Based on this provision, the Court concludes that the plaintiff's cause of action against the union accrued 48 hours after the date of his termination.

For the purposes of this motion, the Court accepts the plaintiff's position that fraud by the defendant employer tolled the statute of limitations from March 4, 1983 (the date Gallon stopped working at Levin Metals) until September 22, 1983. As stated in his complaint, sworn deposition testimony and his grievance form, Mr. Gallon considered himself to be "terminated" as of September 22, 1983. Adding the two days required under the collective bargaining agreement, the six month limitation period mandated under *DelCostello* began to run on September 24, 1983. The plaintiffs' complaint, therefore, had to be filed and served by March 24, 1984.

B. *When did the plaintiff file and serve his complaint?*

It is uncontroverted that the plaintiff failed to serve either defendant before the March 24, 1984 deadline. Where as here, the Supreme Court has adopted completely a statutory scheme that expressly requires both filing and service within the prescribed six month period, the plaintiff's failure to serve the parties bars the action. The Court, therefore, grants the defendants' motion for summary judgment,

IT IS SO ORDERED.

February 8, 1985

EUGENE F. LYNCH
District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERRY GALLON,	)		
	)		
Plaintiff-Appellant,	)		
vs.	)		
LEVIN METALS	)		
CORPORATION, et al.,	)		
	)		
Defendants-Appellees.	)	85-1769)	
	)No.	85-1814)	
	)		
	)		
ROBERT E. HANSTEN,	)		
	)		
Plaintiff-Appellant,	)DC CV	84-2425	EFL
vs.	)	84-7132	WHO
UNITED AIRLINES, INC., et al.,	)		
Defendants-Appellees.	)		

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 07, 1986

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May, 1986

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AFFIDAVIT OF PROOF OF SERVICE BY MAIL

I, Dorothy Reinhardt declare:

That I am employed in the City and County of San Francisco, California.

That I am over the age of eighteen years and not a party to the within cause. My business name and address is Riteway Haluska Printers, Inc., 1275 Folsom Street, San Francisco, California 94103.

That on June 5, 1986 I served the within Brief in Opposition to Petition for Writ of Certiorari in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on June 5, 1986, San Francisco, California

Dorothy M. Reinhardt
Dorothy Reinhardt

STATE OF CALIFORNIA
County of San Francisco

On this 5th day of June 1986, before me, Marcia Helmrich, a Notary Public in and for said county and state, personally appeared Dorothy Reinhardt, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument, and acknowledged that she executed it.

Marcia Helmrich
NOTARY PUBLIC

OFFICIAL SEAL
MARCIA HELMRICH
NOTARY PUBLIC - CALIFORNIA
SAN FRANCISCO
My Commission Expires Sept. 9, 1988

Question Presented

Whether the filing and service requirements of Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b) should be applied to "hybrid" duty of fair representation-Section 301 suits which are filed in state courts?

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, Industrial, Iron and Metal Processing Workers Union, Local 1088, hereby submits this brief in opposition to Berry Gallon's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT

Respondent, Levin Metals Corporation, operates a scrapyard in Richmond, California. Petitioner, Berry Gallon, was employed there until March 4, 1983. As an employee, he was represented for purposes of collective bargaining by Respondent, Industrial Iron and Metal Processing Workers Union, Local 1088, (hereinafter, the "Union").

Sometime shortly before the events directly in question in this dispute, Gallon was terminated by Respondent Levin Metals for fighting with another employee. Pursuant to the terms of the then-current collective bargaining agreement between Respondents, Gallon initiated a grievance regarding his termination. The grievance procedure of the collective bargaining agreement required that a grievance over a discharge must be made in writing within 48 hours. Upon the timely filing of this grievance, Petitioner Gallon was reinstated pursuant to a settlement worked out between Respondent Union and Respondent Levin Metals.

Shortly thereafter, however, on or about March 4, 1983, Gallon's employment with Levin Metals was interrupted, apparently for lack of work. Petitioner Gallon characterizes this separation from his employment as a termination. Respondent Levin Metals characterizes it as a lay off. In either event, Petitioner Gallon did not file a written grievance over this event within the 48 hours specified in the contract. Nearly two months later, on April 22, 1983, Gallon's private counsel wrote to Respondent Levin Metals protesting Gallon's "wrongful termination". Respondent Levin Metals replied on June 9, 1983 to the effect that Petitioner Gallon had not been terminated, but laid off.

There was no further contact between Gallon and Respondents until September 22, 1983, when Petitioner Gallon alleges that at a collective bargaining session he was informed by a representative of Levin Metals that his lay off was permanent, and he would never work for Levin Metals again. Nevertheless, he did not file a written grievance within the requisite 48 hours.

On March 13, 1984, more than a year after he had been severed from employment, Petitioner Gallon filed a written grievance protesting his lay off of March 4, 1983. On March 21, 1984, complaint in this matter was filed in the Superior Court of the State of California for the County of Contra Costa. The record from the court below is silent as to whether Petitioner Gallon ever effected, or even attempted, proper service upon this Respondent.

The United States District Court granted Respondent's motion for summary judgment because Gallon had not filed and served his complaint within the six month period required by Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). The United States Court of Appeals for the Ninth Circuit affirmed.

SUMMARY OF ARGUMENT

This matter should not be held in abeyance pending the disposition of *Macon v. ITT Continental Baking Co.*, 799 F.2d 1166 (6th Cir. 1985); (No. 85-1400, petition filed on February 21, 1986) nor *West V. Conrail*, 780 F.2d 361 (3rd Cir. 1985); (No. 85-1804, petition filed on May 2, 1986). The present case should be treated separately since it raises a different issue: The commencement of the duty of fair representation suits in state courts.

The petition should not be granted since the record below is inadequate for resolution of the statute of limitations issue which Petitioner seeks to present. In addition, there is no important question of federal law appropriate for this Court's attention. There is no inconsistency in circuit court authority, nor any conflicting opinion of a state court of last resort. Moreover, the Ninth Circuit's opinion is consistent with *Del Costello v. Teamsters*, 462 U.S. 151 (1983).

ARGUMENT

Petitioner argues that the present matter should be held for disposition pending the outcome of *ITT Continental Baking, supra*, and *West, supra;* alternatively, it is urged that the writ should be granted and the instant matter should be consolidated with those cases. It is respectfully submitted that neither of these alternatives is appropriate.

Unlike the two cases for which petitions have already been filed, the present action was filed in state court. *Berry Gallon v. Levin Metals, et al.*, California Superior Court for the County of Contra Costa, (Case No. 257539, [1984]). Accordingly, disposition of either *West, supra*, or *Continental Baking, supra*, will not necessarily resolve this case. For example, were this Court to decide, as urged by petitioners in *West, supra*, that the service requirements in an action of this type should be governed by the Federal Rules of Civil Procedures, Rules 3 and 4, that would not resolve the issue in this action, nor in the numerous similar actions brought in state courts.

Second, the record below is not adequate for resolution of the issue: What is necessary to commence a duty of fair representation suit for statute of limitation purposes. Complaint in this matter was filed in state court on March 21, 1984. There is no record that petitioner ever served, or even attempted to serve respondent Union.

All the record shows is an answer filed on April 25, 1984. Accordingly, this court would be unable to ascertain whether service was timely and proper within the Federal Rules of Civil Procedure, Rules 3 and 4, or even with the requirements of the California Code of Civil Procedure. Accordingly, a decision that complaint was timely in *West,* or *Continental Baking, supra,* would not resolve the issue presented by this case.

Nor would resolution of the issue in *West, supra,* even resolve the issue of whether complaint was timely *filed* in the present case. The allegedly grieveable occurrence, characterized by petitioner as a termination, took place on March 4, 1983. The applicable collective bargaining agreement requires a grievant to grieve in writing within 48 hours of the occurrence. Petitioner Gallon did not do so. Instead, two months later, on April 22, 1983, Gallon, by counsel, wrote to respondent Levin Metals protesting Gallon's "wrongful termination". Clearly, by then, at the very latest, Gallon's cause of action accrued. But it was not until March 13, 1984, that Gallon filed a grievance. It was not until March 21, 1984, that he filed a complaint in state superior court. Thus, even if this Court were to find that Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), does not require service within six months, Gallon's action would be barred by his failure to file a complaint within six months.

Third, there are no "special and important reasons" for granting the writ in this case. There are no other reported appellate decisions on the issue of whether the service of a complaint is required within the six month period when a hybrid action is filed in state court. The "spate" of reported opinions which petitioner cites as necessitating this Court's attention emanates from the federal courts exclusively. See, *Williams v. Greyhound Lines, Inc.,* 756 F.2d

818 (11th Cir. 1985); *Dunlap v. Lockheed-Georgia Co.*, 755 F.2d 1543 (11th Cir. 1985); *Simon v. Kroeger Co.*, 743 F.2d 1544 (11th Cir. 1984), *cert. den.*, 105 S.Ct. 2155 (1985). There are no conflicting decisions on this issue among the federal appellate courts, nor between the Ninth Circuit's decision and any state court of last resort. In short, there has been no proliferation of litigation on the issue which would warrant resolution by this Court.

Finally, the Ninth Circuit opinion does not conflict with the applicable decisions of this Court. In *Del Costello, supra,* this Court adopted the six month statute of limitations set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). In so doing, this Court indicated that the statute of limitations set forth in Section 10(b) represented a congressional determination which struck the appropriate balance between fostering stable labor relations and insuring finality of the contractual dispute resolution mechanism on the one hand, and protecting aggrieved employees' rights to overturn such settlements on the other hand. A proper balance between these interests is not effected by permitting Petitioner to attempt to resuscitate an alleged breach of the duty of fair representation more than one year after its occurrence. Moreover, a uniform national labor policy, alluded to by this Court in *Del Costello, supra,* is fostered by requiring filing and service within the six months set forth in the statue. The commencing of duty of fair representation actions should not be contingent upon the diverse and often lengthy periods permitted by the statutory service requirements of the various states. See, e.g., California Code of Civil Procedure, §583.210.[1]

---

[1] "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendent. . . ."

CONCLUSION

The petition for writ of certiorari should be denied. The disposition of this case shold not be held in abeyance pending the outcome of *Continental Baking, supra,* or *West, supra.*

Respectfully submitted,

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QUESTION PRESENTED

Was the Court of Appeals correct in holding that the statute of limitations for filing a complaint and serving notice of a breach of collective bargaining agreement/violation of the duty of fair representation claim in state court is the six-month period provided under section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), rather than any longer period provided under either The California Code of Civil Procedure or The Federal Rules of Civil Procedure?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BERRY GALLON,

Petitioner,

v.

LEVIN METALS CORP., a California Corporation, and INDUSTRIAL, IRON AND METAL PROCESSING WORKERS UNION, LOCAL 1088,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Levin Metals Corporation hereby submits this brief in opposition to Berry Gallon's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the District Court, which is not reported, is set forth at pages 5a to 7a of the Appendix to the Petition for a Writ of Certiorari. The Court of Appeals opinion is reported at 779 F.2d 1439 and is set forth at App. 1a to 4a of the Petition.

JURISDICTION

Respondent accepts petitioner's statement of the Court's jurisdiction.

STATUTE INVOLVED

Respondent accepts petitioner's statement of the statute involved.

STATEMENT

Petitioner Berry Gallon ("Gallon") was laid off by respondent Levin Metals Corporation ("Levin Metals") on March 1, 1983. Gallon failed to file a written grievance protesting this action within 48 hours as specifically required by the collective bargaining agreement between respondent Industrial Iron & Metal Processing Workers Union, Local No. 1088 ("Union"), and Levin Metals. The petitioner claims (although the Company denies the incident took place) that on September 24, 1983 he learned that his layoff was considered a discharge by Levin Metals. However, petitioner again failed to file a grievance within 48 hours of that date. Instead, Gallon attempted to file a grievance more than one year after the initial Company action, on March 13, 1984. Eight days later, on March 21, 1984, Gallon filed a complaint in state court against Levin Metals and the Union regarding the Company's and Union's actions relating back to his March 1, 1983 layoff. That complaint alleged a breach of the collective bargaining agreement by Levin Metals and a breach of the duty of fair representation by the Union. The complaint was not served on the Union until March 28, 1984, and on Levin Metals until April 13, 1984.

After service respondents removed the matter to the United States District Court for the Northern District of California, which then granted respondent's motion for summary judgment and dismissed the complaint as untimely. It should be noted that, for the purposes of the summary judgment motion, the District Court accepted petitioner's allegation that the statute of limitations six-month period did not begin to run until September 24, 1983 (when the petitioner allegedly learned of his discharge) and, therefore, the complaint had been filed within the period mandated by this Court in *Del Costello* v. *Teamsters,* 462 U.S. 151 (1983). However, the District Court held that *Del Costello's* six-month limitations

period, derived from § 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 160(b), applies to service of process as well as filing of a complaint and Gallon's complaint was therefore untimely, since the limitations period expired on March 24, 1984. Pet. App. 6a.

The United States Court of Appeals for the Ninth Circuit affirmed, noting that the balance between "national interests in stable bargaining relationships and finality of private settlement, and an employee's interest in setting aside what he views as an unjust settlement" applies equally well to service requirements as to filing requirements. Therefore, the Ninth Circuit held that this Court in *Del Costello* intended to adopt § 10(b) of the NLRA *in toto*, which includes service of process within its six-month limitations period. Pet. App. 3a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS REGARDING WHETHER THE LIMITATIONS PERIOD FOR SERVICE OF PROCESS IN A BREACH OF CONTRACT/DUTY OF FAIR REPRESENTATION CLAIM IS GOVERNED BY § 10(b) OF THE NATIONAL LABOR RELATIONS ACT WHERE THE ORIGINAL COMPLAINT WAS FILED IN A STATE COURT.

It would be improvident to grant petitioner's writ because there is no conflict with the decision of another Federal Court of Appeals regarding resolution of the question presented in this case. Because there is concurrent federal/state jurisdiction for breach of contract/duty of fair representation claims, *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), this case raises a unique issue that has not been confronted by any other United States Court of Appeals. In determining the appropriate limitations period for service of process, the Ninth Circuit not only had to decide between § 10(b) of the NLRA and the Federal Rules of Civil Procedure, but also between either of those alternatives and the California Code of Civil Procedure. This distinction is important because the implications of adopting any other alternative

to the choice that the Ninth Circuit actually made in *Gallon* are clearly different when the original complaint is filed in a state court rather than a federal court.

Justices who have advocated not following § 10(b) of the NLRA for service of process have quite clearly indicated that the acceptable alternative would be Rule 4 of the Federal Rules of Civil Procedure and they have argued accordingly. *See, e.g., Simon* v. *Kroger Co.,* 105 S.Ct. 2155 (1985) (denial of cert. with three justices dissenting). The same alternative was clearly the basis for the federal courts of appeals decisions relevant to the instant issue. *Macon* v. *Continental Baking Co.,* 779 F.2d 1166 (6th Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3584 (U.S. Mar. 4, 1986)(No. 85-1400); *West* v. *Conrail,* 780 F.2d 361, 364 (3d Cir. 1985), (Gibbons, J., dissenting), *petition for cert. filed,* 54 U.S.L.W. 3744 (U.S. May 13, 1986) (No. 85-1804). However, all of those cases involved suits initially filed in federal court. For example, in dissenting to a denial of a petition for a writ of certiorari in *Simon* v. *Kroger Co.,* 105 S.Ct. 2155 (1985) (White, J., dissenting), Justice White, joined by Justices Brennan and Marshall, objected to not hearing arguments that the limitations period on service in Rule 4 of the Federal Rules of Civil Procedures was more appropriate than the limitations period in § 10(b) of the NLRA. Justice White stated that "[i]n practical effect the Eleventh Circuit's ruling shortens the 6-month period by the amount of time necessary to effect service *under the Federal Rules,*" 105 S.Ct. at 2156 (emphasis added).

However in the *Gallon* case, if the Ninth Circuit had chosen to apply the Federal Rules of Civil Procedure, it would have been imposing federal procedural rules on a state court action. Clearly, adopting that alternative would have intruded unnecessarily on the "autonomy and independence of the state." *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938). Further, it would have unquestionably created new and difficult legal issues such as whether breach of contract/duty of fair representation claims filed in state courts would require such courts to follow other federal procedural rules as well with regard to form of the summons, the method of process, or, for that matter, any other federal procedural requirement established in the Federal Rules of Civil Procedure.

On the other hand, if the Ninth Circuit had chosen the alternative of applying state rules of civil procedure to breach of contract/duty of fair representation claims it would have ignored the teaching of this Court in *Del Costello* that "state statutes of limitation can be unsatisfactory vehicles for the enforcement of federal law." 462 U.S. at 161. In particular, this Court has stated that:

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. . . . Accordingly, '[t]he need for uniformity' among procedures followed for similar claims [citation omitted], as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this [*United Parcel Service Inc.* v. *Mitchell,* 451 U.S. 56, 70-71 (1981)(Stewart J., concurring)].
>
> *Id* at 171.

In dissenting to a denial of certiorari in *Simon,* Justice White appeared to be advocating the possibility of extending the limitations period on service by the one hundred and twenty days allowed under Rule 4(j) of the Federal Rules of Civil Procedure. 105 S.Ct. at 2156. However, it is critical to note that the limitations periods for state service of process are often much longer. For example, in California, where Gallon brought his claim, there is a three-year limitations period on service after the filing of the complaint. Cal. Code of Civ. Pro. § 583.210. The fact that such extensive limitations periods are undesirable in situations such as the present matter was clearly articulated in this Court's *Del Costello* opinion, written by Justice Brennan and joined in by Justices White and Marshall, which noted that:

> This system, with its heavy emphasis on grievance, arbitration, and the 'law of the shop,' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question *as much as* [*three*] *years later.* [*United Parcel Service,* 451 U.S. at 63-64.]
>
> 462 U.S. at 169 (emphasis added).

By adopting the limitations period on filing and service from § 10(b) of the NLRA, the Ninth Circuit chose an alternative that was minimally intrusive on state law while still furthering the national purposes behind the federal claims involved. Hence, in rejecting the procedural limitations periods on service of process contained in both the Federal Rules of Civil Procedure and the California Code of Civil Procedure, the Ninth Circuit resolved an issue not yet even presented to any other federal court of appeals. Thus, no conflict within the various federal courts of appeal exists with regard to the question presented in this case.

II. IF THIS COURT GRANTS PETITIONS FOR CERTIORARI FOR *CONTINENTAL BAKING CO.* v. *MACON* OR *WEST* v. *CONRAIL*, THIS CASE SHOULD NOT BE HELD PENDING DECISIONS IN THOSE CASES NOR CONSOLIDATED WITH THEM.

If this Court grants petitions for certiorari for *Macon* v. *Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3584 (U.S. Mar. 4, 1986) (No. 85-1400), or *West* v. *Conrail*, 780 F.2d 361 (3d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3744 (U.S. May 13, 1986) (No. 85-1804), the *Gallon* case should not be held pending decisions in those cases nor consolidated with them. Additionally, if certiorari is granted in this case, it should be argued and decided independently because, as noted above, a distinct and unique issue is involved. Plaintiffs in *Continental Baking* and *West* both initially filed suit in a federal district court while the plaintiff in this case initially filed suit in state court. For the reasons stated above, this distinction is critical and merits

separate treatment, especially since under The California Code of Civil Procedure the case could have been filed and not served for three years, thereby ignoring the basic thrust of this Court's *Del Costello* decision.

CONCLUSION

The Petition for Certiorari should be denied, but if granted this case should not be consolidated with *Continental Baking* or *West* as it presents a unique and important issue regarding state court claims which does not exist in the other pending matters.

Respectfully submitted,

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